

January 1992

Constitutional Law - *Burdick v. Takushi*: Upholding Hawaii's Ban on Write-in Voting

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Recommended Citation

Elizabeth E. Deighton, *Constitutional Law - Burdick v. Takushi: Upholding Hawaii's Ban on Write-in Voting*, 22 Golden Gate U. L. Rev. (1992).

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CONSTITUTIONAL LAW

SUMMARY

BURDICK v. TAKUSHI: UPHOLDING HAWAII'S BAN ON WRITE-IN VOTING

I. INTRODUCTION

In *Burdick v. Takushi*,¹ the Ninth Circuit held that Hawaii's ban on write-in voting did not violate an individual's constitutional rights to freedom of expression, freedom of association, or freedom of political speech.² The court held that the right to cast a write-in vote is not a fundamental right.³

II. FACTS

Alan Burdick notified Hawaii's Director of Elections and the Lieutenant Governor that he wanted to cast write-in votes in the 1986 primary elections and in future elections.⁴ He was advised by those officials that Hawaii's election laws did not provide for write-in votes; thus his votes would be ignored.⁵

Burdick, a lawyer, originally filed suit in the United States District Court for the district of Hawaii, claiming that his

1. 937 F.2d 415 (9th Cir. 1991) (per Beezer, J.; the other panel members were Skopil, J. and Fernandez, J.).

2. *Id.* at 420-21.

3. *Id.* at 420.

4. *Burdick v. Takushi*, 937 F.2d 415, 416 (9th Cir. 1991).

5. *Id.*

constitutional rights to freedom of expression and association were violated, and attacking Hawaii's election laws on both state and federal constitutional grounds.⁶ The district court granted summary judgment, holding the failure to provide for write-in voting constituted a violation of Burdick's rights of freedom of expression and association.⁷ The Ninth Circuit reversed, directing the district court not to reach the federal constitutional issue under the Pullman abstention doctrine.⁸ On remand the district court certified three questions to the Hawaii Supreme Court to determine if Hawaii's election laws actually *prohibited* write-in voting.⁹ In July 1989 the Hawaii Supreme Court issued its response indicating that Hawaii's election laws did prohibit write-in voting.¹⁰ Burdick renewed his motion for summary judgment, which the district court

6. *Id.*

7. *Id.* at 417. The court issued a preliminary injunction directing the State to provide for the casting and counting of write-in votes in the November 1986 primary statewide elections. The State moved for a stay of the preliminary injunction pending appeal, and the motion was denied. The State appealed the denial of the stay to the Ninth Circuit, which granted the stay pending appeal of the case. *Id.*

8. See *Burdick v. Takushi*, 846 F.2d 587 (9th Cir. 1988). "[A] definitive resolution of the unsettled question whether Hawaii's election laws actually prohibit write-in voting might obviate the need for a federal court to decide the federal constitutional question...." *Id.* at 589. See also *Railroad Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496, 498 (1941). The Pullman abstention doctrine was created to allow the federal courts to abstain from addressing issues of federal law without specific rulings on applicable state law. *Id.* The Ninth Circuit has adopted a three-step analysis for determining whether the Pullman abstention doctrine is applicable. See, e.g., *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 236 (1984); *Burdick*, 846 F.2d at 588. These three steps are: (1) the proper resolution of the state law question at issue must be uncertain; (2) a definitive ruling on the state issue must potentially obviate the need for constitutional adjudication by the federal court; and (3) the complaint must touch on a sensitive area of social policy that the federal courts should not enter into unless there is no other alternative except adjudication of that social policy. *Id.* The Ninth Circuit determined that all three of these criteria were met and the Pullman abstention doctrine was warranted. *Id.* at 588-589.

9. *Burdick*, 937 F.2d at 417. The three questions were:

1. Does the Constitution of the State of Hawaii require Hawaii's election officials to permit the casting of write-in votes and require Hawaii's election officials to count and publish write-in votes?
2. Do Hawaii's election laws require Hawaii's election officials to permit the casting of write-in votes and require Hawaii's election officials to count and publish write-in votes?
3. Do Hawaii's election laws permit, but not require, Hawaii's election officials to allow voters to cast write-in votes, and to count and publish write-in votes?

Id.

10. *Burdick v. Takushi*, 70 Haw. 498, 776 P.2d 824 (1989). The answer to each of the three questions was no. *Id.* at 499, 776 P.2d at 825.

granted.¹¹ The State filed a timely appeal of the summary judgment to the Ninth Circuit.¹²

III. COURT'S ANALYSIS

The Ninth Circuit addressed three issues: first, whether Burdick had proper standing to sue,¹³ second, whether the right to vote for a candidate of one's choice is a fundamental right,¹⁴ and finally, whether the district court failed to give full faith and credit to the Hawaii Supreme Court's ruling.¹⁵

A. STANDING TO SUE

The State of Hawaii claimed that Burdick did not have proper standing to sue because he was ineligible to participate in several of the elections affected by the preliminary injunction.¹⁶ The State also argued that Burdick had "failed to identify a particular candidate for whom he want[ed] to cast his write-in vote."¹⁷ To establish standing to sue, a party must show that he or she has personally suffered some injury because of the allegedly illegal conduct of the defendant.¹⁸ The party must also show the injury can be linked to the challenged action, and "is likely to be redressed by a favorable decision."¹⁹

The Ninth Circuit disposed of this claim by pointing out that the State did not contend any difference in the way the prohibition would be applied to the various elections within the state.²⁰ The prohibition was effective state-wide without restrictions or exceptions.²¹ Finding Burdick was affected

11. *Burdick v. Takushi*, 737 F.Supp. 582 (D. Haw. 1990). The district court again held that Hawaii's prohibition on write-in voting impermissibly infringed upon Burdick's constitutional rights of expression and association. *Id.* at 592. The court issued another preliminary injunction against the State and granted the State's motion for a stay pending appeal. *Id.* at 592-93.

12. *Burdick*, 937 F.2d at 417.

13. *Burdick v. Takushi*, 937 F.2d 415, 417 (9th Cir. 1991).

14. *Id.* at 419.

15. *Id.* at 421.

16. *Id.* at 417. Because the election laws were applied to all elections within the state, Burdick was ineligible to vote in some elections outside his county. *Id.*

17. *Burdick*, 937 F.2d at 417.

18. *Id.* (citing *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982)).

19. *Burdick*, 937 F.2d at 417.

20. *Id.* at 417-18.

21. *Id.* at 418.

personally by the general state-wide ban on write-in voting, the Ninth Circuit concluded he had standing to sue.²²

B. WRITE-IN VOTING AS A FUNDAMENTAL RIGHT

The right to vote is guaranteed by the United States Constitution.²³ In addition, the rights to cast one's vote effectively and to associate for the advancement of political beliefs are guaranteed by the first²⁴ and fourteenth²⁵ amendments. The state may not burden these rights excessively.²⁶

In *Anderson v. Celebrezze*²⁷ the Supreme Court provided an analytical process for determining the validity of a challenge to a specific provision in a state's election laws. The *Anderson* court's two-step analysis first directs consideration toward the character and magnitude of the injury to the plaintiff's asserted first and fourteenth amendment rights.²⁸ Second, the court must "identify and evaluate the precise interests put forward by the

22. *Id.* See also *Erum v. Cayetano*, 881 F.2d 689, 691 (9th Cir. 1989) (Hawaii voter has standing to challenge the whole of the State election laws creating ballot-access restrictions).

23. U.S. CONST. art. I, § 2 provides in part that "the House of Representatives shall be composed of Members chosen every second Year by the People of the several States...." *Id.* This has been interpreted to grant to persons qualified to vote "a constitutional right to vote and to have their votes counted." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). The *Wesberry* court also stated that:

No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined. *Id.*

24. U.S. CONST. amend. I states:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of people peaceably to assemble, and to petition the Government for a redress of grievances.

25. U.S. CONST. amend. XIV, § 2 reads, in part:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

26. *Burdick*, 937 F.2d at 418. See also *Williams v. Rhodes*, 393 U.S. 23, 30-31 (1968). The *Williams* court examined Ohio election laws that made it virtually impossible for new political parties, or old parties with few members, to appear on the ballot for presidential electors. *Id.* at 30. The court held that the election laws resulted in a denial of equal protection and were unconstitutional. *Id.* at 31.

27. 460 U.S. 780 (1983).

28. *Id.* at 789.

State as justifications for the burden imposed by its rule.”²⁹ Balancing these conflicting interests enables the court to determine the constitutionality of the challenged provision of the state’s election law.³⁰ The Ninth Circuit applied this analysis to the challenged Hawaiian election laws to hold that Burdick’s constitutional rights were not violated by Hawaii’s ban on write-in voting.³¹

1. *Character and Magnitude of the Alleged Injury*

Burdick asserted that the right to vote for a candidate of one’s choice is a fundamental right.³² The Ninth Circuit noted that the United States Supreme Court has never expressly addressed the issue of whether the right to cast a write-in vote is a fundamental one.³³ However, various related issues regarding write-in voting have been addressed by the Supreme Court, and these opinions provide conflicting messages.³⁴

29. *Id.* The legitimacy and strength of those state interests, as well as the extent to which they make it necessary to burden the plaintiff’s rights, should be considered. *Id.*

30. *Id.*

31. *Burdick*, 937 F.2d at 418-21. The challenged statutes include Haw. Rev. Stat. § 12-1 (all candidates for elective office, except as provided in § 14-21, shall be nominated in accordance with this chapter); § 12-2 (no person shall be a candidate for any general or special general election unless nominated in the immediately preceding primary or special primary); § 12-22 (shall be only one primary or special primary ballot, clearly designated as nonpartisan, containing names of all nonpartisan candidates to be voted for and offices for which they are candidates). Haw. Rev. Stat. Chap. 12 governs primary elections; the chapter does not expressly forbid write-in votes at primary elections. *Burdick v. Takushi*, 70 Haw. 498, 776 P.2d 824, 825 (1989). The exceptions in § 14-21, referred to in § 12-1, pertain to the election of presidential electors.

32. *Burdick*, 937 F.2d at 418.

33. *Id.* at 420 n.3.

34. *Id.* Compare *Storer v. Brown*, 415 U.S. 724 (1974) with *Anderson v. Celebrezze*, 460 U.S. 780 (1983) and *Lubin v. Panish*, 415 U.S. 709 (1974).

In *Storer* the Supreme Court considered a California statute barring independent candidates from the ballot if they had a registered affiliation with a qualified political party within one year prior to the immediately preceding primary election. The Court found that this statute was constitutional because the state’s compelling interest in maintaining the integrity of the ballot process outweighed the infringement on the voters’ rights. *Storer*, 415 U.S. at 735-36.

In *Anderson* the Court held that an Ohio statute requiring independent presidential candidates to file a statement of candidacy and nominating petition eight months prior to the November general election placed an unconstitutional burden on the voting and association rights of a candidate’s supporters. *Anderson*, 460 U.S. at 805-806.

In *Lubin* the Court considered another California statute, one requiring every candidate to pay a filing fee to obtain nomination papers. The Court held that “absent reasonable alternative means of ballot access, a State may not, consistent with constitutional standards, require from an indigent candidate filing fees that he cannot pay; denying a person the right to file as a candidate solely because of an inability to pay a fixed fee, without providing any alternative means, is not reasonably necessary to the accomplishment of the State’s legitimate interest of maintaining the integrity of elections.” *Lubin*, 415 U.S. at 716-18.

The Ninth Circuit determined that the fundamental nature of the right to vote is rooted in the "citizen's right to have a voice in the selection of those who govern"³⁵ but does not exist "in a vacuum."³⁶ Certain processes govern who may run for office³⁷ and how elections are conducted;³⁸ therefore, there is not an unlimited right to vote for any particular candidate.³⁹

In determining the magnitude of the alleged injury, the court looked to Hawaii's election laws as a whole and how they impinged upon Burdick's right to free political speech.⁴⁰ The Ninth Circuit found that Hawaii's election laws provide qualified candidates with relatively easy access to the ballots.⁴¹ In addition, the court found the prohibition to be content-neutral, applying equally to all write-in votes in all elections.⁴² Because it is content-neutral, the Ninth Circuit determined that the prohibition could be classified as one regulating time, place, or manner of speech.⁴³ The court considered a ban on write-in voting to be a reasonable restriction on the manner of speech; thus, the impingement upon Burdick's right to political speech was minimal.⁴⁴ The court further reasoned that the prohibition on write-in voting "does not

35. *Burdick*, 937 F.2d at 419.

36. *Id.*

37. The United States Constitution contains several limitations on candidates for certain offices. *See, e.g.*, Art. I, § 2 (restricting congressional candidates by a requirement that each be at least 25 years old with a minimum of seven years citizenship); Art. II, § 1 (restricting presidential candidates to those at least 35 years old who are natural born citizens and providing that in a presidential election, the voter casts his or her vote for an Elector rather than for an individual candidate).

38. Numerous Supreme Court cases have upheld various restrictions placed upon the election process. *See, e.g.*, *Clements v. Fashing*, 457 U.S. 957 (1982) (incumbent Justice of the Peace denied right to seek election to state legislature, and state and county office holders deemed automatically resigned if they run for another elective office); *Storer v. Brown*, 415 U.S. 724 (1974) (state can require candidate to sever affiliation with political party one year prior to election in order to run as independent candidate); *American Party of Tex. v. White*, 415 U.S. 767 (1974) (state can deny place on ballot to frivolous candidate by requiring candidates to demonstrate a significant, measurable quantum of community support).

39. *Burdick*, 937 F.2d at 419.

40. *Id.*

41. *Id.* Hawaii's election laws provide that a candidate for county office or the legislature may gain access to the primary ballot by submitting a petition with the signatures of fifteen eligible voters; a candidate for Congress, governor, lieutenant governor, or the board of education must have twenty-five signatures. Haw. Rev. Stat. § 12-5 (Supp. 1990). A new political party may gain a place on the ballot by submitting a petition with signatures of 1% of the total registered state voters as of the last election. Haw. Rev. Stat. § 11-62.

42. *Burdick*, 937 F.2d at 419.

43. *Id.* "A restriction that regulates only the time, place or manner of speech may be imposed so long as it is reasonable." *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 535 (1980).

44. *Burdick*, 937 F.2d at 419.

restrict the alternative channels available to [him] for expressing his political views,"⁴⁵ and stated that a voter's wish to say that no candidate is acceptable does not mean that the voter has the fundamental right to say that on the ballot.⁴⁶

The Ninth Circuit concluded that although the voter "has a protected right to voice his opinion and attempt to influence others," there is no guarantee that a voter may voice any specific opinion through the ballot-box.⁴⁷ Consequently, there are no fundamental constitutional protections to vote for any candidate that a voter chooses.⁴⁸

2. *State Interests Sought to be Protected*

The State of Hawaii argued that it sought to protect three state interests by its ban on write-in voting: political stability, voter education, and protecting the internal structure of the State's election laws.⁴⁹

To support its interest in political stability, the State claimed that its prohibition on write-in voting avoids "sore loser" candidacies and "party raiding."⁵⁰ The court found that the write-in voting ban assures that sore losers do not "sidestep the ballot access requirements" and prevents voters from circumventing Hawaii's ban on cross-over voting.⁵¹

Hawaii also argued that write-in candidacies would confuse the election process by not providing voters with sufficient information upon which to base their votes.⁵² The Ninth Circuit

45. *Id.* The Ninth Circuit did not suggest what alternative channels might be appropriate.

46. *Id.* at 420.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* A "sore loser" candidacy occurs when a nominee loses a primary election and then later gathers enough support to beat the primary winner in the general election. See *Anderson*, 460 U.S. at 784 n.2; *Storer*, 415 U.S. at 735. "Party raiding" (also known as "cross-over voting") occurs when "voters in sympathy with one party designate themselves as voters of another party so as to influence or determine the results of the other party's primary." *Rosario v. Rockefeller*, 410 U.S. 752, 760 (1973). The Supreme Court has held that these are legitimate interests. See *Munro v. Socialist Workers Party*, 479 U.S. 189, 196 (1986) (states have a compelling interest in ensuring that unrestrained factionalism does not damage the election process).

51. *Burdick*, 937 F.2d at 420. Cross-over voting is another term for party raiding. See *supra* note 50.

52. *Id.* The Supreme Court has held that there is a legitimate state interest in "fostering an informed and educated electorate." *Id.*; see also *Anderson*, 460 U.S. at 796.

found that Hawaii's ban on write-in voting legitimately protected the State's interest in voter education by ensuring candidates' early appearance on the ballot, giving voters ample opportunity to examine a candidate's qualifications and political views.⁵³

The State of Hawaii also asserted that this challenged prohibition was designed to protect the integrity of its election process.⁵⁴ Under Hawaii election law, a candidate who is unopposed in a primary is automatically seated in the general election.⁵⁵ Allowing for write-in votes would nullify the statute because a candidate unopposed in a primary by any candidate running on any other ticket could still be challenged in the general election by a write-in candidate.⁵⁶ Therefore, the Ninth Circuit found that the prohibition legitimately protected the integrity of Hawaii's election system.⁵⁷

3. *Balancing the Injury Against the State's Interest*

In balancing the amount of infringement on Burdick's rights against the State of Hawaii's interests protected by the ban on write-in voting, the Ninth Circuit held that the modest

53. *Burdick*, 937 F.2d at 420.

54. *Id.* The Supreme Court has held that this is a compelling state interest. *Eu v. San Francisco City Democratic Central Comm.*, 489 U.S. 214, 226 (1986).

55. Haw. Rev. Stat. § 12-41 states:

[A]ny candidate for any county office who is the sole candidate for that office at the primary or special primary election, or who would not be opposed in the general or special general election by any candidate running on any other ticket, nonpartisan or otherwise, and who is nominated at the primary or special primary election shall...be declared to be duly and legally elected to the office for which the person was a candidate regardless of the number of votes received by that candidate.

Haw. Rev. Stat. § 12-42 states:

(a) Any candidate running for any office in the State of Hawaii in a special election or special primary election who is the sole candidate for that office shall, after the close of filing of nomination papers, be deemed and declared to be duly and legally elected to the office....

(b) Any candidate running for any office in the State of Hawaii in a special general election who was only opposed by...candidates running on the same ticket in the special primary election and is not opposed by any candidate running on any other ticket, nonpartisan or otherwise, and is nominated at the special primary election shall...be deemed and declared to be duly and legally elected to the office....

56. *See Burdick*, 937 F.2d at 420.

57. *Id.*

restriction on Burdick's rights of expression and association were justified.⁵⁸ The court reasoned that "in light of the ease of access to Hawaii's ballots, the alternatives available to Burdick for expressing his political beliefs, the State's broad powers to regulate elections, and the specific interests advanced by the State," the ban on write-in voting did not "impermissibly infringe" upon Burdick's rights.⁵⁹

4. *Rejection of Fourth Circuit View*

The Ninth Circuit recognized that its holding was inconsistent with the Fourth Circuit's decision in *Dixon v. Maryland State Administrative Board of Election Laws*.⁶⁰ The *Dixon* court held that the casting and counting of write-in votes implicated fundamental rights.⁶¹ The Fourth Circuit considered that a vote is still constitutionally significant even if cast for a long-shot or fictional candidate because the right to vote for the candidate of one's choice includes the right to say that no candidate is acceptable.⁶² Consequently, the Fourth Circuit concluded that the expression of this viewpoint, in the form of a write-in vote, is a constitutionally protected right.⁶³

The Ninth Circuit declined to follow the Fourth Circuit's reasoning.⁶⁴ The court's position was that the Fourth Circuit failed to distinguish between the right to participate equally in the election of those who govern and the right to try to influence the election process.⁶⁵ The Ninth Circuit agreed, however, that hope of being able to propagate one's views and to increase one's ability to influence the outcome of an election might be constitutionally protected rights.⁶⁶ The court's failure to follow the Fourth Circuit's decision stemmed from its belief that a prohibition on write-in

58. *Id.* at 421.

59. *Id.* at 420-21.

60. 878 F.2d 776 (4th Cir. 1989).

61. *Id.* at 782. The challenged election law in *Dixon* required candidates for certain city offices to pay a \$150 filing fee in order to qualify as an "official" write-in candidate. Only official write-in candidates could have the votes cast for them publicly reported and attain office. *Id.*

62. *Id.* The *Dixon* court further reasoned that write-in votes are used "in the hope, however slim," that the votes will be successful in propagating the voter's views to increase his or her influence. *Id.*

63. *Id.* There was no petition for a writ of certiorari filed with the Supreme Court in the *Dixon* case.

64. *Burdick*, 937 F.2d at 421.

65. *Id.*

66. *Id.*

voting does not substantially burden that hope.⁶⁷ The Ninth Circuit concluded that this hope is not significantly burdened because there are numerous other methods available for propagating a voter's views and increasing a voter's influence.⁶⁸

C. FULL FAITH AND CREDIT GIVEN TO STATE COURT RULING

The State of Hawaii argued that Burdick was required to explicitly reserve his federal arguments when the three questions on Hawaii state law were certified to the Hawaii Supreme Court.⁶⁹ The State engaged in some contorted reasoning to support this argument. The Hawaiian Constitution is very similar to United States Constitution; therefore, Burdick should have limited his arguments before the Hawaii Supreme Court to the "textually distinct provisions of Hawaii law."⁷⁰ Burdick did not so limit his arguments; thus, he elected to seek a "comprehensive and final adjudication of his rights in the state court."⁷¹

The Ninth Circuit found no merit in the State's contention.⁷² The court noted that the parties had stipulated that the three questions should be certified to state court.⁷³ The district court's order implied that if the district court was required to re-address the federal constitutional question after the state court's ruling, the district court would do so consistently with its prior ruling.⁷⁴

The Ninth Circuit held that Burdick did not waive his right to have the federal claims heard by the federal court; consequently, the federal court did give full faith and credit to the state court's ruling on the three certified questions.⁷⁵

67. *Id.*

68. *Id.* However, the Ninth Circuit did not give any suggestions of other methods available for a voter to use to propagate views or increase influence.

69. *Burdick v. Takushi*, 937 F.2d 415, 421 (9th Cir. 1991).

70. *Id.*

71. *Id.*

72. *See id.*

73. *Burdick*, 937 F.2d at 422.

74. *Id.* If Hawaii's law permitted but did not expressly provide for write-in votes, there would be no federal constitutional issue to decide. *Id.* However, if there was an actual prohibition on write-in voting, the district court reserved the right to address the federal constitutional question presented. *Id.*

75. *Id.*

IV. CONCLUSION

In *Burdick v. Takushi*⁷⁶ the Ninth Circuit held that there is no fundamental right to cast a write-in vote.⁷⁷ The court also held that Hawaii's ban on write-in voting is not an infringement of a voter's constitutional rights to freedom of political speech and association.⁷⁸

Although the Fourth Circuit's holding is not binding on the Ninth Circuit, the Ninth Circuit avoided the opportunity to build on a sound course of law. The fundamental rights of free political speech and association logically should include the right to have our votes counted, regardless of the candidate voted for.

In December 1991 the Supreme Court granted the petition for writ of certiorari that was filed in August.⁷⁹ We should hope, as we enter an election year, that the Supreme Court will reverse *Burdick* and approve the *Dixon* holding, thus confirming that write-in voting is part of our fundamental right to vote.

*Elizabeth E. Deighton**

76. 937 F.2d 415 (9th Cir. 1991).

77. *Id.* at 416.

78. *Id.* at 420-21.

79. *Burdick v. Takushi*, 116 L.Ed.2d 653 (1991).

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